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PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd

B

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–2025 OF 2000
RAMLY ALI J
27 NOVEMBER 2008

C

Contract — Recovery — Recovery for work done — Consultancy fees — Whether plaintiff negligent in carrying out work — Whether claim subject to set-off and counterclaim — Whether claim proved with cogent evidence — Whether proven

D

Evidence — Expert opinion — Scientific information — Admissibility — Unopposed expert witness — Whether expert evidence obviously lacking in defensibility

E

Tort — Negligence — Professional negligence — Damages — Allegation of — Consultant engineer — Standard of care — Reasonable care and skill — Whether defendant adduced sufficient evidence of professional negligence

F

The defendant appointed the plaintiff, a consultant engineer, for their project in the district of Gombak. The letter of appointment and the consultancy service agreement provided, inter alia, that the plaintiff's fees were at the rate of 2.5% of the estimated contract sum for the said project. As at 11 August 1996, the balance outstanding consultancy fees payable to the plaintiff was RM1,005,136.47 and the defendant had agreed to pay the said sum in 42 instalments from June 1995 until November 1998. The plaintiff agreed to the above arranged payment. The defendant however, made payment of the plaintiff's fees only in respect of the monthly instalments of June 1995 to October 1997 and had defaulted the payment for the remaining instalments. The plaintiff therefore filed this action against the defendant to recover the outstanding unpaid fees amounting to RM767,700 and costs. In its defence and counterclaim, the defendant contended that the plaintiff had been negligent in carrying out its duties as the consultant engineer which the defendant claimed had caused losses amounting to RM3,672,436.90. Thus, the defendant contended that their liability to pay the plaintiff's fees was subject to a defence of set-off and counterclaim it had against the plaintiff for losses sustained by it due to the plaintiff's negligence in carrying out the works.

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Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) The plaintiff had clearly proved its case for the unpaid fees against the defendant. Even the defendant had admitted in its pleading that there were unpaid fees due and owing from it to the plaintiff but only contended that the same should be set-off against the defendant's losses due to professional negligence by the plaintiff. The defendant also purported to counterclaim against the plaintiff for such losses (see para 100).

(2) In a claim for professional negligence, the defendant must prove its case of negligence against the plaintiff. Cases were proved by having credible witnesses and supporting documentary evidence. In this case, the defendant had neither and thus had failed to prove that the plaintiff was in breach of its duties owed to the defendant in tort. Even if the defendant had proven breaches of duties by the plaintiff (which was denied), the defendant had failed to prove any losses sustained from the alleged breaches (see para 101).

(3) Although it is not for the plaintiff to disprove the defendant's action of negligence, in this case, the plaintiff had produced actual, cogent, factual and expert evidence by way of credible witnesses and contemporaneous supporting documentary evidence that there was no negligence on their part (see para 102).

[Bahasa Malaysia summary

Defendan telah dilantik oleh plaintif, jurutera perunding, untuk projek mereka di daerah Gombak. Surat perlantikan dan perjanjian perkhidmatan perundingan telah memperuntukkan, antara lain, bahawa bayaran plaintif adalah pada kadar 2.5% daripada jumlah kontrak yang dianggarkan bagi projek tersebut. Setakat 11 Ogos 1996, baki tertunggak bayaran perundingan yang perlu dibayar kepada plaintif adalah RM1,005,136.47 dan defendan telah bersetuju untuk membayar jumlah tersebut melalui 42 kali ansuran daripada Jun 1995 sehingga November 1998. Plaintif telah bersetuju dengan aturan pembayaran tersebut. Walau bagaimanapun, defendan telah membuat pembayaran yuran plaintif hanya berkenaan dengan ansuran bulanan untuk Jun 1996 hingga Oktober 1997 dan telah gagal membuat pembayaran untuk ansuran yang selebihnya. Plaintif oleh itu telah memfailkan tindakan ini terhadap defendan untuk mendapatkan kembali bayaran tidak berbayar yang tertunggak berjumlah RM767,700 dan kos. Dalam pembelaan dan tuntutan balas, defendan menegaskan bahawa plaintif telah cuai dalam menjalankan tugasnya sebagai jurutera perunding yang mana defendan mendakwa telah menyebabkan kerugian berjumlah RM3,672,436.90. Oleh itu, defendan menegaskan bahawa tanggungjawab mereka untuk membayar yuran plaintif

A adalah tertakluk kepada pembelaan penolakan dan tuntutan balas yang ada terhadap plaintif bagi kerugian yang ditanggung oleh mereka disebabkan kecuaian plaintif dalam menjalankan kerja-kerja tersebut.

B

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

(1) Plaintif dengan jelas telah membuktikan kesnya untuk bayaran tidak berbayar terhadap defendan. Malahan defendan telah mengakui di dalam plidingnya bahawa terdapat bayaran tidak berbayar yang tertunggak dan terhutang daripadanya kepada plaintif tetapi menegaskan bahawa perkara tersebut seharusnya ditolak dengan kerugian defendan disebabkan kecuaian profesional oleh plaintif. Defendan juga bertujuan untuk menuntut balas terhadap plaintif bagi kerugian tersebut (lihat perenggan 100).

(2) Dalam tuntutan untuk kecuaian profesional, defendan mestilah membuktikan kes kecuaian terhadap plaintif. Kes-kes dibuktikan melalui saksi yang boleh dipercayai dan keterangan dokumen sokongan. Di dalam kes ini, defendan tidak mempunyai kedua-keduanya dan oleh itu telah gagal untuk membuktikan bahawa plaintif telah memungkiri tanggungjawabnya kepada defendan dalam tort. Walaupun defendan telah membuktikan kemungkiran tanggungjawab oleh plaintif (yang mana adalah dinafikan), defendan telah gagal untuk membuktikan apa-apa kerugian yang dialami daripada kemungkiran yang didakwa (lihat perenggan 101).

(3) Walaupun ianya bukan bagi plaintif untuk membuktikan sebaliknya tindakan kecuaian defendan, dalam kes ini, plaintif telah mengemukakan keterangan sebenar, meyakinkan, faktual dan keterangan pakar melalui saksi yang boleh dipercayai dan keterangan dokumen sokongan yang kontemporari bahawa tidak terdapat kecuaian di pihak mereka (lihat perenggan 102).]

Notes

For cases on expert opinion generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1403–1515.

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1133–1206.

For cases on recovery for work done, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4674–4675.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 (refd)

Dr Lo Sook Ling Adela v Au Mei Yin Chistine & Anor [2002] 1 SLR 408, CA (refd)
East Ham Corp v Bernard Sunley & Sons Ltd [1966] AC 406, HL (refd)
George Hawkins v Chrysler (UK) Ltd & Burne Associates [1986] 38 BLR 40, CA (refd)
Golf Cheque Book Sdn Bhd & Anor, The v Nilai Springs Bhd [2006] 1 MLJ 554; [2006] 1 CLJ 259, CA (refd)
Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners [1975] 1 WLR 1095, CA (refd)
Hanafiah, Raslan, Mohamed & Partners v Weng Lok Mining Co Ltd [1977] 1 MLJ 248, HC (refd)
Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)
Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation & Ors [1985] 35 BLR 1, CA (refd)
Jameson v Simon [1899] 1 F (Court of Sessions) 1211 (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 17, CA (refd)
Mayor, Aldermen, and Burgesses of Kingston-upon-Hull v Harding & Anor [1892] 2 QB 494, CA (refd)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd [1969] 1 Lloyd's Law Rep 214, HC (refd)
Saeng-Un Udom v PP [2001] 3 SLR 1, CA (refd)
Sim & Associates (sued as a firm) v Alfred Tan [1994] 3 SLR 169, CA (refd)
Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)
Sutcliffe v Thackrah & Ors [1974] AC 727, HL (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)

Legislation referred to

Evidence Act 1950 s 45(1)
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and Licensing) Regulations 1989

Lim Chee Wee (TH Foo and LT Kuo with him) (TH Foo & Associates) for the plaintiff.
Azman Jamlus (Suhaimi Khoo Zulkifli & Chong) for the defendant.

Ramly Ali J:

[1] The plaintiff's claim against the defendant is for unpaid consultant fees in the sum of RM767,700 as at November 1998 and for interest thereon from 1 December 1998 until full settlement and costs.

[2] In supporting its claim, the plaintiff pleads the following facts:

(a) the defendant is the owner and developer of the development on Lots 10242 and 9337 at Mukim Batu, Daerah Gombak ('the project'). The defendant appointed the plaintiff as the civil, structural, mechanical and electrical engineer ('consultant engineer') for the project by the defendant's letter of appointment dated 19 July 1990 and an undated and unsigned consultancy service agreement prepared by the defendant;

(b) the plaintiff's fees were agreed at the rate of 2.5% of the estimated contract sum for the project; as per para 2 of the letter of appointment and s 4.01 of the consultancy service agreement;

(c) as at 11 August 1996, the balance outstanding consultancy fees payable to the plaintiff was RM1,005,136.47 which the defendant proposed to pay in 42 instalments from June 1995 until November 1998. This was agreed to by the plaintiff as evidenced by the plaintiff's signature on the defendant's letter dated 11 August 2005;

(d) the defendant made payment of the plaintiff's fees only in respect of the monthly instalments of June 1995 to October 1997. These instalments were made from September 1995 to October 1998. In November 1998, the defendant stopped paying the plaintiff which eventually led to the filing of this action by the plaintiff in 2000 to recover its unpaid fees amounting to RM767,700 as at November 1998 (and interest thereon from 1 December 1998 until full settlement).

[3] In its defence and counterclaim, the defendant contends that the plaintiff had been negligent in carrying out its duties as the consultant engineer which the defendant claims had caused losses totaling RM3,672,436.90 as follows:

(a) for alleged failure to make provision for electrical supply for Phase 1C-2, the defendant claims the sum of RM55,100 for building a separate TNB substation;

(b) for alleged delay in producing and submitting forms for Phase 2B to Majlis Perbandaran Selayang ('MPS'), the defendant claims the sum of RM436,452 for late delivery, management fees and loss of interest;

(c) for alleged wrong advice given on sewerage pipe, the defendant claims the sum of RM490,532.48 for wasted cost and expenses and RM1,609,762 for late delivery, management fees and loss of interest;

(d) for alleged failure to solve and repair the structural defects at Lot 25 at Phase 3A-2, the defendant claims the sum of RM75,780 for the costs of repair and compensation to the purchaser;

(e) for alleged failure to solve piling work problem at Phase 3B, the defendant claims the sum of RM811,400.43 for late delivery to its purchasers; and

(f) for additional cost paid to AML Jurutera Perunding for completing the plaintiff's works, the defendant claims RM193,409.

[4] The defendant contends that it is entitled to set-off its losses against any amount of unpaid fees it is obliged to pay the plaintiff as well as to counterclaim for such losses against the plaintiff.

[5] The defendant contends that its liability to pay the plaintiff's fees is subject to a defence of set-off and counterclaim it has against the plaintiff for losses sustained by it due to the plaintiff's negligence in carrying out the works. The defendant has not pleaded or particularised the duties breached by the plaintiff in its defence and counterclaim. However, from the defendant's categorisation of its counterclaim, the relevant duties alleged to have been breached by the plaintiff are as follows:

(a) duty to design;

(b) duty to advise;

(c) duty to supervise; and

(d) duty to solve problems or remedy defects as they arise.

[6] The plaintiff on the other hand contends that the plaintiff's evidence confirms that the amount of RM767,700 is due and owing from the defendant to the plaintiff as at November 1998. The plaintiff further contends that there is not a single letter or documents from the defendant to the plaintiff disputing or questioning the plaintiff's invoices for such fees (as claimed) or refusing to pay on the basis of the plaintiff negligence or failure to perform its duties as consultant engineer for the project. The plaintiff also contends that no allegation of negligence was ever raised by the defendant until the filing of this action by the plaintiff. In fact the defendant did not even reply to the plaintiff's letter of demand to the defendant dated 27 September 2000 issued by the plaintiff's solicitors. To the plaintiff, this illustrates the defendant's allegations of negligence are not genuine and amount to an afterthought to delay or avoid paying the plaintiff its fees.

[7] The issue of the plaintiff's consultancy fees as claimed is not much in dispute. The plaintiff's letters to the defendant dated 10 July 1998, 22 July 1998, the defendant's letter to the plaintiff dated 14 July 1998 and the meeting held between representatives of the plaintiff and the defendant on 8 July 1998 clearly indicate that the consultancy fees is not in dispute. The main issue in the present case is that whether the defendant is entitled to

set-off its losses against any amount of unpaid fees it is obliged to pay the plaintiff as well as to counterclaim for such losses against the plaintiff.

[8] Before discussing each alleged instances of negligence, it is important to bear in mind the law on negligence and the standard of care owed by the plaintiff as the consulting engineer to the defendant.

THE LAW — ON THE PLAINTIFF'S DUTIES AS CONSULTANT ENGINEER FOR THE PROJECT

[9] The defendant at all material times is the owner and developer of the project. The plaintiff was appointed a consultant engineer for the project vide the defendant's letter of appointment dated 19 July 1990. The project involves permanent and temporary works. There are distinctions between permanent works and temporary works in a project.

[10] A consulting engineer's duty is to design, advice on and supervise permanent work to be constructed or installed in accordance with the relevant contract. This is contrasted with the contractor who is in charge of temporary works and the working methods required to bring the permanent work to completion. consultant engineer owes no duty with regard to temporary works. As such, the consulting engineer's duties must always be viewed in that light.

[11] In the leading textbook on construction law, *Duncan Wallace's Hudson's Building & Engineering Contracts* (11th Ed), Vol 1, Sweet & Maxwell London, 1995 the learned author at p 166 says:

> The A/E (architect/engineer)'s duty is to design permanent work which, once in place will best satisfy his client's requirements … The contractor's areas of expertise, on the other hand, lies in the 'how' or method, as opposed to the 'what' or final result of construction; that is, in the design selection and organisation of temporary works and the various possible working methods required to bring the permanent work to completion.

Paras 7–037 at pp 899–900:

> (g) Temporary works and methods of workings:
>
> It has been seen that, in the absence of express provision, the choice of his existing working methods and temporary works (that is, the 'how' as opposed to the 'what' of construction) will be a matter for the contractor to decide, and that correspondingly the owner or his A/E will owe no duty of guidance or intervention to the contract in that regard.

At p 901:

> Ideally, therefore, a construction contract should accept and indeed expressly state the general principle that temporary works or methods of working will, in the absence of express provision in the specification or elsewhere, be the choice and responsibility of the contractor.

Paras 2–138 at p 314:

> ... the contractor is entitled to choose his own methods of working or temporary works; the corollary of this is that the contractor is not entitled, when faced with difficulties, to demand or require instructions as to how to overcome them. The architect's duty is normally confined to stipulating the final permanent result required, and if this had already been done, he is under no further duty to assist, and if inclined or requested to do so should normally be careful to adopt a permissive attitude rather than to give mandatory instructions. Contractors in difficulties, however, frequently demand instructions and even threaten to discontinue working unless told what to do. This attitude has no legal justification, and even if instructions are given they will not entitle a contractor to extra payment …

[12] Thus in *Mayor, Aldermen, and Burgesses of Kingston-upon-Hull v Harding & Anor* [892] 2 QB 494, where the contractors' sureties argued that they were released by a jury's finding that there had been failure by the engineers to properly supervise which had led to skimping of the work … Lord Esher MR said:

> The question is, what is the meaning of the provision as to superintendence by the plaintiff's engineer? It was contended that the meaning really was that the corporation was to direct in what manner the work should be done. When one considers the position of the corporation and the contractors and what the latter have to do, I think it is obvious that was not the meaning. The corporation never meant to undertake to direct in what manner the work should be done, nor did the contractors agree to submit to their directions. They were to do the work as they thought fit, and in the manner which their experience taught them was the best. The meaning of the provision was only that the corporation should have a right to observe and see how the work from time to time was being done …

The above passage reflects a correct and realistic appreciation of the situation and rights of the parties under such terms.

[13] In short, unless expressly provided for in the contract of engagement, the consulting engineer owes no duty to design, advise or supervise the contractor on his choice of the working method or sequence of construction or to offer a technical solution where the contractor has committed an error or is otherwise confronted with difficulties.

STANDARD OF CARE — REASONABLE SKILL AND CARE

[14] The standard of care owed by the plaintiff to the defendant is of reasonable care and skill in carrying out its duties as the consulting engineer of the project. This standard is judged objectively. In relation to an action for negligence against an architect for breach of duty to supervise, the Singapore Court of Appeal's case of *Sim & Associates (sued as a firm) v Alfred Tan* [1994] 3 SLR 169 is particularly relevant. At p 185, Karthigesu JA held that:

> The architect is only required to give reasonable supervision to the building works and whether he has breached the requisite standard of supervision must be measured against the standard expected of a reasonably skilled architect.

At p 181:

> Failure of supervision
>
> Clearly, the linchpin issue in this appeal is whether the appellants as the architect under the building contract breached their duty of supervision over the works carried out by the contractors. In dealing with this issue, a reference to the general principles of law relating to the duty of supervision of architects is instructive.
>
> It is settled law that an architect in a building contract has a duty to supervise the building works to ensure that they are being carried out in conformity with the contractual specifications. In the absence of a specific provision in the contract, such a duty will be implied in law: *R v Peto* [1826] 1 Y & J 37; *Kimberly v Dick* [1871] 13 LR Eq 1 and *Brodie v Cardiff Corp* [1919] AC 337, at p 351 (HL).
>
> The standard of supervision required of an architect ultimately depends on the facts of each case, in particular on the terms of his contract with the employer and the main building contract. In the absence of any provision in the contract requiring a higher degree of supervision, an architect is merely required to give the building works reasonable supervision.
>
> Furthermore, an architect's liability is not absolute in the sense that he is liable whenever loss results from his acts. It must be shown that he has been negligent in that he has failed to exercise the requisite standard of care. A person alleging negligence against an architect must call evidence as to what constitutes lack of care in the circumstances. As the editors of *Keating on Building Contracts*, infra, indicate at p 313:
>
> … unless there are special circumstances, the normal measure of an architect's skill is that of ordinarily skilled architects. An error of judgment may or may not amount to negligence. If the majority of architects would, under the circumstances, have done the same thing this normally provides a good defence, for 'a defendant charged with negligence can clear himself if he shows that he acted in accord with general and approved practice'. Where there is no accepted practice, he will not be negligent if he acted in accordance with a practice accepted as proper by a responsible body of architects, even if another body of competent professional opinion considered the practice wrong, (at p183B–D).

[15] At p 184, Karthigesu JA disagreed with the trial judge's view that the architect's duty of supervision required him to discover defective works 'at the time they were being done or soon after they were done' because 'this places too onerous a duty of supervision on the architect' and 'would require almost constant supervision on the part of the architect to be able to discover all defects in the building works as an when the occur'. The court also stressed at p 187 that 'the mere existence of defective works does not, of itself, translate into a finding of lack of supervision against the architect in a building contract'.

[16] In the present case s 3.02(b) of the consultancy service agreement (prepared and not disputed by the defendant) further strengthen this position by providing the followings:

> In providing the services in Section 3.01 above to the Client, the Consultant Engineer shall exercise a reasonable standard of skill and diligence normally expected and accepted by the profession of Engineering.

DUTIES TO DESIGN AND TO ADVISE

[17] The standard expected of consulting engineers in designing and giving advice is only that of reasonable care and skill. A designer does not guarantee that a design will work or that it will be fit for its intended purpose. Refer to *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 WLR 1095 (CA) which dealt with a claim for professional negligence against consulting engineers. At p 1100D, Lord Denning MR held:

> Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.
>
> The suggestion that by reason of this finding every professional man or every consulting engineer by implication of law would be guaranteeing a satisfactory result is unfounded (at 1103F per Geoffrey Lane LJ).

[18] The standard of care of professionals in *Greaves*' case has been cited by the High Court of Malaysia in *Hanafiah, Raslan, Mohamed & Partners v Weng Lok Mining Co Ltd* [1977] 1 MLJ 248 by Chang Min Tat J at p 250. The relevant standard of care of reasonable care and skill in giving advice is reiterated in *George Hawkins v Chrysler (UK) Ltd & Burne Associates* [1986] 38 BLR 40 (CA) where Dillon LJ at p 54 held:

> In this court we are bound by the established rule that a professional man, as in *Greaves*, only undertakes, when his advice is sought, to use reasonable care and skill in his profession, and does not warrant the accuracy of his advice in the absence of special circumstances.

This is further affirmed by Neil LJ in his finding at p 55:

> I have come to the firm conclusion, however, that it is not open to this court, except where there are special facts and special circumstances, to extend the responsibilities of a professional man beyond the duty to exercise reasonable skill and care in conformity with the usual standards of his profession. There are many authorities which establish that this is the accepted duty of a professional man...
>
> I am satisfied that as the law stands at present, a warranty of fitness of purpose will not be implied as a matter of law where the consulting engineer is retained to advise or to design.

[19] In *George Hawkins*' case, the engineers were engaged to prepare the design and specification of new communal showers and to supervise the installation on a very tight time schedule. The Court of Appeal drew an important distinction between a party contracted for both design and supply of a product, who may be under an implied contractual duty to ensure that the product is reasonably fit for its intended purpose and a contracting party who is a professional man providing advice or design alone (ie without supplying any product) where no warranty will normally be implied beyond a term that reasonable skill and care will be taken in giving the advice or preparing the designs.

[20] In the present case before the court, the plaintiff falls under the latter category where no warranty of fitness for purpose would be implied.

DEFECTS OR ERRORS DO NOT IMPLY NEGLIGENCE

[21] The standard of reasonable care and skill is not a standard of perfection. It is not sufficient to show an error in order to establish a failure to exercise reasonable care and skill. Actual negligence must be proven. In the House of Lords decision in *Sutcliffe v Thackrah & Ors* [1974] AC 727, at p 760 Lord Salmon held as follows:

> It by no means follows that a professional valuation was negligently given because it turns out to be have been wholly wrong. Nor does the fact that an architect's certificate was given for the wrong amount of itself prove negligence against the architect. Whether or not there has been negligence is, of course, a pure question of fact depending upon the particular circumstances of each case.

[22] A design that is faulty or wrong advice does not necessarily imply negligence. In other words, not every error or wrong advice is negligence.

[23] In *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Law Rep 214, the High Court of Australia decided that a faulty design did not necessarily imply negligence on the part of the designing engineers. Barwick CJ's finding at p 217 (second column) reads as follows:

> We think it was an error to confine faulty design to 'the personal failure or non-compliance with standards which would be expected of designing engineers' on the part of the designing engineers responsible for the piers. To design something that will not work simply because at the time or its designing insufficient is known about the problems involved and their solution to achieve a successful outcome is a common enough instance of faulty design. The distinction which is relevant is that between 'faulty' ie, defective design and design free from defect. We have not found sufficient ground for reading the exclusion in this policy as not covering loss from faulty design when, as here, the piers fell because their design was defective although, according to the finding, not negligently so. The exclusion is not against loss from 'negligent designing' it is against loss from 'faulty design', and the latter is more comprehensive than the former.

Windeyer J at p 218 (second column) held as follows:

> Doubtless a faulty design can be the product of fault on the part of the designer. But a man may use skill and care, he may do all that in the circumstances could reasonably be expected of him, and yet produce something which is faulty because it will not answer the purpose for which it was intended. His product may be faulty although he be free of blame.

[24] This proposition is also reaffirmed in the House of Lords' decision in *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406, at p 443F (per Lord Upjohn).

[25] Further in the English Court of Appeal decision of *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation & Ors* [1985] 35 BLR 1 Robert Goff LJ stated at pp 21–22 as follows:

> … the professional man may either have produced a design which, though not perfect, falls within the acceptable bracket, or he may have produced one which falls short of the acceptable standard. Plainly, in the first example he is not negligent; but in the second, it may be difficult not to draw the conclusion that he is negligent. For, with the exercise of due skill, he should have known what the acceptable bracket was, and he should have been able to form a correct judgment whether or not his design would produce a product which did or did not fall within that bracket. It is this that produces the feeling that, in cases such as these, a professional man is being treated as though he gave an absolute warranty. The

> true answer must be to recognise that his obligation is only to exercise due care and skill, though, where he is held to have been negligent, to identify precisely the negligence of which he is held guilty.

[26] In the case of *Sim & Associates (sued as a firm) v Tan Alfred* [1994] 3 SLR 169 at p 181, the Court of Appeal in Singapore held that 'an architect's liability is not absolute in the sense that he is liable whenever loss results from his acts. It must be shown that he has been negligent in that he has failed to exercise the requisite standard of care, a person alleging negligence against an architect must call evidence as to what constitutes lack of care in the circumstances'.

[27] More importantly, the Court of Appeal (in that case) rejected the level of the duty imposed on the architect by the High Court in respect of supervision which would require him to discover defective works at the time they were being done or soon after they were done. According to the Court of Appeal, this would place too onerous a duty of supervision on the architect under the building contract.

[28] After reviewing and adopting the decision of *Jameson v Simon* [1899] 1 F (Court of Sessions) 1211, and *East Ham Corp v Bernard Sunley & Sons* [1966] AC 406, the Court of Appeal (in *Sim & Associates*) held that:

> The architect is only required to give reasonable supervision to the building works and whether he has breached the requisite standard of supervision must be measured against the standard expected of a reasonably skilled architect.

(see also, *Philip CP Chan's Commonwealth Construction Cases — The Singapore Perspective*, Sweet & Maxwell Asia pp 37–41).

[29] So much for the relevant laws on the issue of professional duty of a consultant engineer in a project involving permanent and temporary works. The court shall now deal with each instances of negligence as alleged by the defendant against the plaintiff as consultant engineer for the project in question.

Failure to make provision for electrical supply for Phase 1C–2: RM55,100 for building separate substation

[30] The defendant contends that the plaintiff had been negligent in failing to advise on and make provision for the electrical supply for Phase 1C-2 which resulted in the defendant incurring RM55,100 as the cost of building a separate substation. The defendant purports to set-off and counterclaim this amount against the plaintiff.

[31] It is not disputed that Phase 1C originally consists of 60 units of shoplots with a petrol kiosk. Throughout 1994 to 1996, the plaintiff conducted detailed load study, proposed a standard double chamber TNB substation and made several submissions to TNB to cater for the electricity requirement of Phase 1C. In mid — 1997, the defendant replaced the petrol kiosk with ten additional units of four storey shoplots. On 5 January 1998 TNB required a separate substation to be built to supply additional electricity for the revised Phase 1C-2.

[32] On 21 January 1998, the plaintiff informed the defendant that the substation was to be built on land which the defendant did not own and as such, the defendant had to get the land owner's consent. In mid 1998, the defendant had yet to sort out the land issue. This, inter alia, was discussed in a meeting between the plaintiff and the defendant on 8 July 1998 and recorded in item no 5 of the plaintiffs' letter to the defendant dated 10 July 1998. From mid to late 1998, the construction of Phase 1C-2 was delayed and then suspended because the defendant's main contractor had stopped works due to the defendant's non-payment of certified sums. At that time, the defendant and the main contractor were in negotiations to form a joint venture as the defendant could not keep up with the contractor's progress payment.

[33] The defendant had contended in item (1) of its further and better particulars that the plaintiff should have made provision for electrical supply for Phase 1C-2 in June 1998. This was not possible as the works on Phase 1C-2 were suspended at that time due to the defendant's failure to pay the main contractor. The defendant had not, prior to its defence and counterclaim, complained about the plaintiff's alleged negligence in failing to advise and make provision for the separate substation in 1998 which only first surfaced after the plaintiff commenced this court action to recover its fees.

[34] The defendant has not proven its loss at all. The defendant is merely relying on the progress claim and recommended payment certificate dated 14 July 1998 from the new consulting engineers AML Jurutera Engineering who took over the plaintiff's works to the defendant; the letter from the contractor who built the substation, Soon Seng Yap Construction Sdn Bhd dated 14 July 2000 submitting its progress claim to the defendant; and the defendant's internal memorandum dated 19 July 2000 from the chief project manager to DW2 instructing the latter to make payment to Soon Seng Yap.

[35] There is no document at all before the court to show that the defendant has actually paid the amount of RM55,100 to the contractor. During re-examination of DW2, the defendant purported to show that it has paid the contractor based on the absence of legal action by the contractor

against the defendant. Absence of legal proceedings from a potential creditor cannot by any stretch, be sufficient to prove that the defendant has actually paid the said creditor.

Delay in producing and submitting forms for Phase 2B to Majlis Perbandaran Selayang (MPS): RM436,452 for late delivery, management fees and loss of interest

[36] The defendant alleges that due to the plaintiff's delay in producing and submitting the relevant forms and documents for Phase 2B to Majlis Perbandaran Selayang ('MPS'), the defendant suffered damages amounting to RM436,452 for late delivery of Phase 2B to the purchasers, payment of management fees and loss of interest.

[37] Based on the overall evidence, the court finds that the plaintiff had at all material times carried out all its responsibilities with reasonable skill and care (as highlighted earlier) and in an independent and professional manner. The plaintiff had submitted the relevant forms and documents to MPS on 1 October 1998. The plaintiff could not have submitted the forms and documents to MPS any earlier because at the material time, the works at Phase 2B were not completed to the stage which warranted a certificate of fitness ('CF') to be issued although the works may have been practically completed.

[38] At the material times, the delivery of vacant possession of houses to purchasers did not require a CF. Issuance of a CF was not required in order to deliver vacant possession to the purchasers.

[39] In a meeting on 8 July 1998, the defendant told the plaintiff that the issuance of the CF would result in sufficient cash-flow to enable payment of the plaintiff's fees and appealed to the plaintiff to 'assist' in obtaining clearance letters from the authorities to obtain the CF. The defendant was in a hurry to obtain the CF for Phases 2B and 2A because it was facing financial problems at that time and could not pay its contractors and consultants including the plaintiff.

[40] The plaintiff replied by its letter dated 10 July 1998 that it was willing to do so if the works were in fact completed according to its satisfaction and the specifications. The plaintiff maintained that it could not assist if the works were incomplete or suspended by the main contractor due to the defendant's non-payment of certified sums.

[41] In this claim, the defendant's allegation of negligence against the plaintiff is its purported delay of 47 days in submitting the forms to MPS. The delay of 47 days is calculated from 14 August 1998 which is the date of the certificate of practical completion ('CPC') to 1 October 1998 which is when the plaintiff submitted the forms to MPS. Such delay is insufficient to establish a claim in professional negligence based on the legal principled discussed earlier. Firstly, the defendant's allegation and calculation of delay is very unreasonable as it assumes that the plaintiff will submit all the forms on the very same date of the CPC. Even DW2 acknowledged during cross examination that a reasonable time for the plaintiff to compile and prepare the documents for submission to MPS was a week from receiving the CPC. However, this one week allowance was not taken into account in calculating the alleged period of delay.

[42] Delay in handing over to purchasers was actually due to late completion of Phase 2B. PW2 testified that the contractual completion for Phase 2B was 23 April 1997 but there were at least five extensions of time ('EOT') applied for by the main contractor, Amaze Square Corporation Sdn Bhd and granted by the architect, Akitek Bersatu which extended the time for completion to 23 February 1998. DW2 has agreed to the fact that the completion of Phase 2B had been extended by at least 10 months or 300 days from the original contractual completion date.

[43] Among the reasons for the EOTs were delay in the handing over of the site, changes to the platform levels and the raising of levels for certain blocks none of which had anything to do with the production and submission of forms by the plaintiff to MPS.

[44] In the circumstances, the court finds that any delay in the handing over of Phase 2B to the purchasers was not caused by the plaintiff but by the delay in the construction and completion of Phase 2B by the main contractor of approximately one year from the original completion date.

[45] Further, DW2 testified that the construction of Phase 2B was not completed by the extended completion date and liquidated and ascertained damages ('LAD') had been imposed on the main contractor although he did not provide further particulars nor the supporting documents.

[46] DW2's evidence reinforces the possibility that any delay in the handing over Phase 2B to the purchasers was attributable to the late construction and completion by the main contractor instead of any late submission of forms by the plaintiff to MPS as alleged. In any event, any loss suffered by the defendant due to this delay should already be covered by the LAD imposed by the defendant on the main contractor.

[47] During cross examination, DW1 admitted that part of the delay in the construction of Phase 2B and 3B was due to the contractor's delay. It is also important to remember that the contractor had suspended works on Phase 2B in mid 1998 due to the plaintiff's non-payment of certified sums.

[48] Further, even if the issuance of CF is late for whatever reason, this does not affect the delivery of vacant possession. According to the laws on housing developments at the material time ie, before the amendments to the Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989 in 2002, 2003 and 2007; the delivery of vacant possession to the purchasers did not require the issuance of a CF.

[49] Even if the defendant could prove breach of duty and causation (which is denied), the defendant failed to prove its claimed damages. The defendant is merely relying on a self-prepared tabulation of particulars to show that compensation had been paid out to the purchasers due to late delivery of Phase 2B. The defendant has not adduced any actual proof of payment to the purchasers nor relevant documents to substantiate its claim for example, the sale and purchase agreements, payment vouchers, etc.

[50] The defendant's purported claim for management fees and loss of interest also suffer the same lack of proof. The defendant has only adduced a joint venture agreement between the defendant and the land owner, Tenaga Ehsan Sdn Bhd who happens to be the defendant's holding company. The said agreement contains a provision for management fees which the defendant purports to rely on to recover alleged management fees from the plaintiff. This is despite the fact that the plaintiff is not even privy to that said agreement and did not know of its terms. As a general rule, the doctrine of privity of contract enables only the original party to a contract to sue or be sued upon it. A party to the contract is not entitled to make a third party to the contract liable on any obligations imposed under the contract upon the third party (see Gopal Sri Ram JCA's comment in the Court of Appeal's case of *The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 MLJ 554; [2006] 1 CLJ 259 (CA) at p 268 (CLJ).

The law on recovery of damages

[51] The law is clear that the person seeking a claim for damages has the burden of proving both the facts and the amount of damages before he can recover them, (see *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA) Abdul Malek Ahmad JCA at p 85B citing *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177; *Popular Industries*

Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA) (per Zainun Ali JCA at p 241).

[52] Damages must be proved with real or factual evidence (as opposed to mere particulars, summaries, estimations or general conclusions) in order for a party to recover them. In *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 (CA), the Court of Appeal unanimously dismissed the respondent's counterclaim for damages due to lack of proof, in particular, p 20 where Thomson CJ held:

> As regards the claim, the trial judge did not make any finding of fact beyond saying that he believed the respondent's evidence and did not believe the evidence of the appellant. He accordingly gave judgment in favour of the respondent for $59,262.92. He has, however, given no indication as to how he arrived at this result.
>
> … I regret, however, that I am compelled to disagree with the trial judge as to how much these damages should be.
>
> ... With regard to the claim for damages I would preface what I have to say by quoting the following passage from the judgment of Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel Ltd*:
>
> > ... plaintiff's must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.
>
> … Then he claimed what he called special damages amounting to the sum of $4,888.92. Of this, $2,888.92 was said to be for 'traveling, board, subsistence and other' expenses incurred by him between May, 1953, and March, 1955, in connection with the agreement. There is not a scrap evidence as to any connection between the expenditure of this sum and the appellant's repudiation of the agreement and in the absence of such evidence the respondent is not entitled to recover anything.
>
> … Finally he claimed general damages amounting to $40,000 being estimated loss of profits on 4,000 tons of scrap at $10 a ton … The trial judge allowed this claim of $40,000 but for myself I regret to have to say that I cannot find any evidence to support it.

[53] In the case of *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* which was a decision on assessment of damages, the Court of Appeal set aside the damages awarded by the High Court to the respondent and restored the registrar's award of nominal damages due to lack of proof. In that case, Zainun Ali JCA held the non-production of necessary supporting documents

by the respondent as fatal to the respondent's claim for damages. In delivering the unanimous decision of the Court of Appeal, Her Ladyship made the following pertinent remarks:

> … the statements of account ... are by themselves insufficient to establish the respondent's claim for damages. (At para [52] p 237D).
>
> ... the nature of an audited account in the instant case is no different from the 'sheet of calculations' tendered in the *Popular* case, or the 'summary of accounts' tendered in the *KPM Khidmat* case, as these documents are nothing more than general conclusions or results from the books of account or record books. (At para [82] p 240H).
>
> the respondent failed to prove the contents of the statements and how their contents were related to the alleged breach … No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered there from flowing from the breach. (At para [54] p 237F)
>
> The respondent's failure to produce or tender the account books or the necessary support documents upon which the audited statements of account were based is fatal to his claim for damages. (At para [55] p 237G)
>
> ... documents upon which the transportation receivables were based had not been produced or tendered … Likewise, the truck utilisation schedules were also not tendered ... (At para [70]–[71] p 239E–F).

[54] Based on the evidence before the court in the present case, the defendant has not even produced a sample of the sale and purchase agreements or payment vouchers let alone the sale and purchase agreements and payment vouchers themselves to show that compensation has indeed been paid to the purchasers on which its summary is based. Nor has the defendant produced any documents to show actual payment of management fees to Tenaga Ehsan Sdn Bhd on which its computation is based. The documents relied on by the defendant are merely summaries, tabulations and sheets of calculation which have been held by the Court of Appeal in *Sony Electronics* case to be insufficient to prove damages. In the circumstances, the defendant's counterclaim of RM436,452 in the present case must necessarily fail for lack of proof.

[55] Once again, the defendant has never written to the plaintiff about such losses before the commencement of this court action. This indicates that the defendant's counterclaim is not genuine but a mere afterthought which occurred to the defendant after it was served with the plaintiff's writ for unpaid fees.

Wrong advice on sewerage pipe at Phase 2B — RM490,532.48 for wasted costs and expenses; RM1,609,762 for late delivery, management fees and loss of interest

[56] The defendant is purporting to recover these damages from the

plaintiff for alleged wrong advice rendered by the plaintiff on the sewerage pipe works at Phase 2B which led to the defendant incurring wasted cost and expenses of RM490,532.48 and compensation for late delivery, management fees and loss of interest of RM1,609,762.

[57] As discussed earlier as the consulting engineer, the plaintiff owes the defendant no duty to advise, supervise nor offer solutions in relation to the sewerage problem as it relates to temporary works. Even if the plaintiff does owe such a duty (which is denied), the plaintiff has not breached its duty on the present facts and in the circumstances of this case. Even if the plaintiff has breached its duty owed to the defendant (which is denied), the plaintiff's breach did not cause the defendant's loss which was caused by the main contractor's bad installation and/or the defendant's own failures to pay the main contractor. Even if the plaintiff did cause the defendant's loss (which is denied), the defendant has failed to prove its loss.

[58] On 4 June 1990, the plaintiff forwarded the defendant a soil investigation report on the project land prepared by Associated Geo Engineering Sdn Bhd. At all material times, there was no localised site investigation report. In early 1997, when the defendant's main contractor, Amaze Square Corporation Sdn Bhd started works on Phase 2B, it encountered slime. This was not expected by any of the parties. The main contractor suggested using sheet pile and *bakau* sleeper to solve the problem.

[59] Although the plaintiff had forwarded a soil investigation report to the defendant which must have been made available to the main contractor, the main contractor must also carry out its own investigation and not rely solely on the report provided. In normal construction practice, when a contractor encounters any problem with unexpected soil conditions, it is for the contractor to propose or counter-propose the necessary methods.

[60] In this case after the architect and the defendant's instruction, the main contractor proceeded with sheet piling. However, while carrying out the works, the sheet pile method was found to be unworkable. Thereafter, a different and more expensive method called pipe jacking was proposed by the main contractor during a meeting on 12 December 1997 and this method was eventually used. The pipe jacking is approximately three times more expensive than sheet piling and was carried out by pipe jacking specialists called Pedoman Cermat Sdn Bhd ('Pedoman').

[61] The plaintiff's role in supervising the sewerage system was very limited in that:

(a) except for recommending that the main contractor follow the original position for the sewer line, the plaintiff did not make any proposals with regard to the slime problem;

(b) both the sheet piling and pipe jacking methods were proposed by the main contractor;

(c) most of the time, the main contractor dealt with the defendant directly and not with the plaintiff;

(d) the main contractor's claims for payment were made directly to the defendant. The plaintiff did not have any certifying role in the main contractor's claims;

(e) it was the main contractor who arranged for Pedoman to carry out the pipe jacking and asked the defendant to make direct payment to Pedoman;

(f) the defendant was fully aware of the plaintiff's limited role in supervising the sewerage system.

[62] In general, the main contractor's sewerage work was poor. Apart from installing sheet piling which failed, the main contractor also caused delays and problems to the sewerage and plumbing works including damage to the road by services crossing and failed to make good the same despite being instructed to do so. In the end, the architect issued a certificate of non-completion dated 24 February 1998 against the main contractor. On 4 March 1998, the defendant gave the main contractor notice to make good the damage failing which the defendant would engage a third party to do the same and deduct the cost from the main contractor. On 30 July 1998, the plaintiff sent a letter to the main contractor informing that because it had failed to make good the damage, a third party would be appointed to do the job.

[63] The works in Phase 2B were not completed as at 30 July 1998 to warrant obtaining clearance letters from the relevant authorities for the CF application. Clay pipe and MS pipe methods (which were pleaded in paras 7c and 22 of the defendant's defence and counterclaim) were not adopted at all.

THE EXPERT, PW3'S OPINION

[64] The independent expert witness, PW3, is a geotechnical engineer with considerable academic credentials and vast practical experience (see PW3's curriculum vitae annexed to his report, P1). P1 is a detailed and comprehensive report (with glossary of geotechnical terms used in the report) independently prepared by PW3 to assist the court. P1 is based on sound ground and fully supports the technical aspects in relation to sewerage and slime problems.

[65] In P1, PW3 made, inter alia, a comprehensive study of the available documents, previous engineering and soil investigation reports; tested the subsoil strength properties using the consolidated isotropic undrained triaxial test and analysed the open cut method using the slope stability program to reach his conclusion that the failed sheet piling method which was proposed and adopted by the main contractor was not installed to have proper interlocking to avoid the flow of slime through the gaps. PW3 also reported in P1 that the piles were not embedded deep enough and did not have proper/adequate propping/strutting. This is consistent with PW2's testimony that the main contractor did a poor job in installation.

[66] During the cross-examination and re-examination of PW3, he reiterated that sheet piling is temporary work and therefore within the contractor's realm of supervision. This is consistent with the settled general principles in construction law discussed above and the evidence given by PW2.

THE LAW OF EXPERT EVIDENCE

[67] Opinions of experts are admissible to furnish the court with scientific information which is unlikely to be within the experience and knowledge of a judge, (s 45(1) of the Evidence Act 1950).

[68] Where expert testimony is required on certain matters including technical matters relevant in allegations of professional negligence (in this case, against a consulting engineer), it is not open to the court to decide on such matters in the absence of such evidence.

[69] In the case of *Syed Abu Bakar bin Ahmad v PP* [1984] 2 MLJ 19 (FC) Abdul Hamid J (as he then was) held at p 23:

> It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so as to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence.

[70] PW3's evidence was not challenged at all during cross-examination. The defendant has also not tendered any independent expert to refute or disprove the technical matters contained in PW3's testimony.

[71] The duties of a judge in dealing with unopposed expert witness are succinctly stated in an extract of *10 Halsbury's Laws of Singapore [2000]*

(120.257) which cited in para 26 of the Singapore Court of Appeal's decision in *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1 (per LP Thean JA) as follows:

> … The court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. While the court is not obliged to accept expert evidence by reason only that it is unchallenged (*Sek Kim Wah v PP* [1987] SLR 107), if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence.
>
> In this case, it certainly cannot be said that Dr Lau's opinion was 'obviously lacking in defensibility'. In our opinion, his evidence was based on sound grounds and supported by the basic facts. In the face of such evidence, the judge, with respect, was not entitled to venture his own opinion on a matter which was clearly 'outside the learning of the court'. In our judgment, in this case, he was not entitled to reject Dr Lau's opinion and substitute it with one of his own.

[72] This principle was followed in another Singapore Court of Appeal's case, *Dr Lo Sook Ling Adela v Au Mei Yin Chistine & Anor* [2002] 1 SLR 408 where Chao Hick Tin JA held at para 48:

> ... In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds: see *Saeng-Un Udom v PP* … We did not think just because the age (of a tree) given was an estimate, that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a matter of judgment. This was a scientific issue outside the learning of a judge.

[73] In other words, the court may not reject unopposed expert evidence unless the evidence of the expert is 'obviously lacking in defensibility'. PW3's evidence in the present case cannot be said to be 'obviously lacking in defensibility'.

[74] DW1's evidence in relation to the sewerage problem is unreliable. DW1 was the resident engineer for this project, yet he has not read the soil investigation report. It is also noted that DW1 agreed that the soil investigation was done at random points and not for the entire project land and did not know if there were other parts of the project land which had the same problem as Phase 2B.

[75] DW2's evidence is inconsistent. DW2 was cross examined about the meeting he attended on 8 July 1998 wherein he initially testified that defects were discussed at the said meeting. However, when pressed about his letter to the plaintiff, DW2 contradicted himself and stated that matters regarding defects were not discussed at the said meeting.

[76] Sheet piling is part of temporary works of which the contractor is in charge. The evidence of PW2, PW3 and even DW1 support this. The plaintiff owes no duty to instruct, supervise, advise on nor offer solutions to unexpected difficulties and problems encountered by the contractor in carrying out temporary works such as sheet piling and pile jacking.

[77] Even if the plaintiff owes such a duty (which is denied), the plaintiff has not breached it in light of the following facts in this case namely that:

(a) there was no localised site investigation report for the project land on Phase 2B and the plaintiff did not know of the existence of slime in the soil;

(b) the contractor should have done its own investigation of the soil conditions;

(c) the contractor's proposal to use sheet piling which eventually failed was approved by the architect and the defendant;

(d) the sheet piling method failed due to poor installation by the contractor; and

(e) the plaintiff's involvement was very limited.

[78] The defendant has not adduced any sufficient evidence to found a proper claim for professional negligence against the plaintiff on this allegation. See *Sim & Associated (sued as a firm) v Tan Alfred* [1994] 3 SLR 169 (CA) where Karthigesu JA at held (2) at 171B–C:

> The respondent had failed to discharge the burden of proving that the appellants by approving the adhesion method, had approved a non-contractual or defective method of affixing the marble cladding. Neither was there sufficient evidence in the record which would warrant a finding of failure of supervision over the marble works by the appellants. The bare assertions of some of the Respondent's witnesses that the appellants had been negligent in supervising the marble works carried out by the contractors is no substitute for the type of concrete evidence that is required to found a proper claim for negligent supervision against an architect.

[79] Even if the plaintiff has breached its duty to advise, supervise and/or offer solutions to the slime problem in Phase 2B (which is denied), the defendant has not proven that it was the plaintiff's breach which has caused the defendant's loss. Any losses suffered by the defendant for delay and wasted expenses were due to the main contractor inadequate installation of the sheet piling as confirmed by the expert PW3. The delay to Phase 2B was due to suspension of works by main contractor due to the defendant's non-payment on certified sums which is discussed above and recorded in contemporaneous documents. In other words, any losses were caused by the defendant's main

A contractor and the defendant's own breaches in failing to honour its agreement with the main contractor to pay certified sums.

Structural defects at lot 25 at Phase 3A–2: RM75,780 for repair and compensation to the purchaser

B

[80] The defendant is purporting to claim RM75,780 against the plaintiff for the cost of repair and compensation paid to the purchaser of Lot 25 at Phase 3A-2 as a result of the plaintiff's alleged failure to solve and repair the C structural defects at Lot 25.

[81] The plaintiff's evidence in relation to this claim shows that in total, there are 68 lots or units in Phase 3A-2 but only a single complaints of structural defects or cracks from the owner of Lot 25. Lot 25 was an isolated D incident not due to any failure in the plaintiff's design.

[82] In May 1996, when the defendant first notified the plaintiff about the cracks at Lot 25, the plaintiff implemented monitoring procedure on the defects. On 14 May 2006, a report on settlement was compiled and sent to E the plaintiff for advice and the plaintiff proposed rectification methods and procedures. At all material times, the cause of the defects at Lot 25 was unknown. On 30 April 1998, the Architect requested the plaintiff to submit a structural defect report and proposal for rectification for the defendant's perusal and further action by 14 May 1998. However, before the plaintiff F could do so, the defendant sent a letter to the plaintiff on 2 May 1998 stating that the plaintiff was responsible for the defects and must rectify the same.

[83] On 22 May 1998, the plaintiff received a letter of offer from Associated Geo Engineering Sdn Bhd offering to carry out the remedial G works on Lot 25 at the plaintiff's cost. The cost estimation for the remedial works was about RM35,000. The plaintiff did not issue any letter of award for the remedial works because it could not agree with the defendant that it (the plaintiff) should bear the cost. On 17 June 1998, MPS wrote to the H plaintiff asking for a defects report to be submitted within a week.

[84] On 22 June 1998, the plaintiff duly submitted its report to MPS. In summary, the plaintiff concluded that the defects were caused by the relative settlements of foundation and that occupancy was not advisable until I thorough remedial works were carried out.

[85] PW3 in his evidence testified that after examining the complaint and studying the subsoil conditions, the piling records for the piles installed for Lot 25, PW3 concluded in his independent report, P1 that 'problem

experienced by Lot 25 is an isolated case and would be unforeseeable' as 'the working piles were able to support all the buildings without giving problem on all other units'. This indicates that the defects at Lot 25 could not have been due to the plaintiff's design as to structure as all the working piles were able to support the rest of Phase 3B without any problems to all the other units. PW3 also described the problem at Lot 25 as unforeseeable ie, unexpected.

[86] PW3 was not cross examined at all on his evidence nor did the defendant adduce an independent expert to refute or challenge PW3's evidence on structural defects at Lot 25.

[87] During the cross-examination, DW1 agreed with the last sentence of PW3's statement in the 'FINDING & CONCLUSIONS' in P1 namely that, '... should the working piles were installed to achieve a more stringent set, such as 2000psi as adopted in the test piles, the defect at Lot 25 might be avoidable'. This meant that the defendant agrees with PW3's evidence that the defects at Lot 25 might have been due to the installation of the working piles and not due to any defect in the plaintiff's design.

[88] The plaintiff is only obliged to exercise reasonable care and skill in designing the structural works of Phase 3A-2. The fact that Lot 25 was an isolated case and all the other Lots in Phase 3A-2 are free from structural defects is evidence that the cracks at Lot 25 is not due to the plaintiff's design. This is corroborated by PW2's and PW3's evidence which have not been challenged.

[89] In any event, mere existence of defects does not per se imply negligence. See the Singapore Court of Appeal's case of *Sim & Associates v Alfred Tan* where Karthigesu JA at p 187 stressed that the mere existence of defective works does not, or itself, translate into a finding of negligence against the contract administrator in a building contract.

Failure to solve piling works problem in Phase 3B: RM811,400.43 for late delivery

[90] The plaintiff's evidence in relation to the piling works problems in Phase 3B is that the plaintiff prescribed the hammer driving system to install the piles for Phase 3B but this was not adopted because on 10 June 1997, the defendant's piling contractor, RM Top Holdings ('RM Top') suggested the more superior, Bon-Pile hydraulic injection system using 150mm x 150mm RC piles to minimise noise and air pollution. The Bon-Pile system was approved by the plaintiff on 18 June 1997. The plaintiff requested for a guarantee letter for the Bon-pile from RM Top many times which was finally

extended to the plaintiff on 14 August 1997. A load test was carried out by RM Top using 150mm x 150mm RC piles from 24 June 1997 to 26 June 1997 and the results forwarded to the plaintiff on 3 July 2007. A second load test was carried out by RM Top also using 150mm x 150mm RC piles from 7 July 1997 to 9 July 1997 and the results forwarded to the plaintiff on 13 July 1997.

[91] According to PW2, in normal construction practice, as soon as the piling contractor encounters any unset pile, it is the contractor's responsibility to immediately notify the consulting engineer. The piling contractor should also give timely and frequent piling records to the engineer.

[92] In this case, RM Top first encountered unset piles as early as 7 August 1997. However, instead of immediately notifying the plaintiff, RM Top continued to pile and only informed the plaintiff after two weeks by its letter dated 21 August 1997 which the plaintiff only received on 25 August 1997. By the time the plaintiff was consulted, the problem was at such an advanced stage and the plaintiff had no choice but to instruct RM Top to stop piling. The defendant's resident engineer, DW1 was aware of the unset piles in August 1997 but failed to notify the plaintiff promptly.

[93] In normal construction practice, it is the piling contractor who has failed to set piles who should submit rectification proposals to the consulting engineer. This is especially so if the contractor allowed such a high percentage of unset piles to occur. If a piling contractor recommended an alternative piling system, it is for that piling contractor to submit a proposal for system to the consulting engineer. This is especially so if the contractor discovers that his initial method was unworkable.

[94] PW3's, finding in his independent report, are self-explanatory and reproduced below:

> 4.0 Independent Findings
>
> It is reasonable for PB to accept RM's proposed injection piling system in view of the track records submitted by RM. The piling system was perceived to be better than drop-hammer and more environmental friendly. The performance of the piling system was verified by load tests conducted on two test piles.
>
> It is puzzled than why 125mm sq RC piles, were installed by RM since he indicated Bon-pile and the tested piles were 150mm. No discussion or decision on the use of 125mm sq RC piles can be found from the available information.

The decision made by PB to stop piling of other blocks was correct in view of the high percentage of unset pile.

Understandably the injection piling system is better than drop-hammer driving. If the former encounter high percentage of unset piles, it is likely that the latter may experience more problems. In view of the high percentage of the 125mm square RC piles were unset, the 125mm square RC pile was not suitable for the capacity proposed and ground condition. The site is underlain by limestone bedrock notorious for its erratic nature that causes difficulties for piling works.

The delay in reporting the piling problem by RM to PB until some 55% of the 494 piles were unset formed a major obstacle in the rectification due to large cost involved. Since piling work was under RM's control, he should be alert and started looking into the unset pile problem soon after it happened. It should not take long for RM to realise the problem as the percentage of unset pile was so significant.

Normally in a piling contract, all problematic piles should be replaced by the contractor at no extra cost. It will be the contractor's responsibility to propose the rectification works for the consultant's approval. An experienced contractor will price in the potential pile damages in view of the pile type, size, capacity specified and the subsoil conditions. For piling works in limestone area, pile damages may be as high as 20% to 25% as reported in published cases (see case histories published in the references).

[95] It is noted that PW3's view was that it was reasonable for the plaintiff to accept RM Top's proposal for injection piling and to instruct RM Top to carry out two pile test. PW3 found it strange that RM Top had installed 125mm sq RC piles instead of 150mm sq Bon-piles which were proposed and tested. PW3 found 125mm square RC piles to be unsuitable for the soil conditions.

[96] The plaintiff cannot be faulted for RM Top's installation of the piles because from mere visual or physical inspection, it is difficult to tell the difference between 125mm sq RC piles and 150mm sq ones. PW3 testified that it was reasonable for the plaintiff to instruct RM Top to stop piling in view of the high number of unset piles. PW3 also testified that RM Top should be alert and notify the plaintiff as soon as there were unset piles and not wait until the problem was so advanced. Significantly, PW3's evidence that it is the piling contractor's responsibility to propose rectification works and solutions at its own costs is also consistent with PW2's evidence.

Additional costs paid to AML Jurutera Perunding to complete the plaintiff's works: RM193,409.99

[97] The defendant is claiming the sum of RM193,409.99 by way of set-off or counterclaim against the plaintiff for additional costs paid to the

new consulting engineer, AML Jurutera Perunding to complete the plaintiff's unfinished works after the defendant had terminated the plaintiff's services on 11 November 1998.

[98] The court finds that it was the defendant's own action in terminating the plaintiff's services on 11 November 1998 when the works were not completed which led to this alleged loss. The plaintiff was at all material times willing, able and ready to complete the works.

[99] In any event, even if the defendant was entitled to terminate the plaintiff and engage a new consulting engineer to take over, the defendant has not proved its loss.

CONCLUSION

[100] In this case, the plaintiff has clearly proven its case for unpaid fees against the defendant. Even the defendant has admitted in its pleading that there are unpaid fees due and owing from it to the plaintiff but only contends that the same should be set-off against the defendant's losses due to professional negligence by the plaintiff. The defendant also purports to counterclaim against the plaintiff for such losses.

[101] In a claim for professional negligence, the defendant must prove its case of negligence against the plaintiff. Cases are proved by having credible witnesses and supporting documentary evidence. In this case, the defendant has neither. The defendant has failed to prove that the plaintiff was in breach of its duties owed to the defendant in tort. Even if the defendant has proven breaches of duties by the plaintiff (which is denied), the defendant has failed to prove any losses sustained from the alleged breaches.

[102] Although it is not for the plaintiff to disprove the defendant's action of negligence, in this case, the plaintiff has produced actual and cogent factual and expert evidence by way of credible witnesses and contemporaneous supporting documentary evidence that there was no negligence on the plaintiff's part.

[103] In conclusion, based on the facts and evidence tendered in this case; the law and submissions by both parties, the plaintiff's claim for unpaid fees in the sum of RM767,700 at November 1998 should be allowed with interest from 1 December 1998 until full payment and costs. On the contrary, the

defendant's defence of set-off and counterclaim for the total sum of RM3,672,436.90 or any other sum should be disallowed with costs.

Plaintiff's claim allowed with costs and defendant's counterclaim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed